

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GREGORY LYNN CAIN,
Inmate #6433561,

Plaintiff,

vs.

SHERIFF BILL KOLENDER, DEPUTY
BUFFORD, DEPUTY SUNICA,
COUNTY OF SAN DIEGO,
JOHN DOES 1-7,

Defendants.

Civil No. 07-0331 BTM (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
AND**

**(2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF SUMMONS,
COMPLAINT AND EXHIBIT TO
COMPLAINT PURSUANT TO
FED.R.CIV.P. 4(c)(2)
AND 28 U.S.C. § 1915(d)**

Plaintiff, a civilly committed person residing at George Bailey Detention Facility in San Diego, California and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, along with a Motion to Proceed *In Forma Pauperis* ("IFP") [Doc. No. 2]. Plaintiff alleges that his constitutional rights were violated when he was housed at George Bailey Detention Facility in 2006.

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1 **II. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee only
 5 if the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Here, The Court finds that Plaintiff has submitted
 7 an affidavit which complies with 28 U.S.C. § 1915(a)(1) and S.D. CAL. CivLR 3.2. Based upon
 8 this financial information, the Court **GRANTS** Plaintiff's Motion to Proceed IFP. Because
 9 Plaintiff is a civil committee and not a "prisoner" as defined by 28 U.S.C. § 1915(h), the Court
 10 will waive the initial civil filing fee. *See Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir.
 11 2000).

12 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2)**

13 A complaint filed by any person proceeding in forma pauperis is subject to sua sponte
 14 dismissal to the extent it is "frivolous, malicious, fail[s] to state a claim upon which relief may
 15 be granted, or seek[s] monetary relief from a defendant immune from such relief." 28 U.S.C.
 16 § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam) (holding that
 17 "the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners."); *Lopez v. Smith*, 203
 18 F.3d 1122, 1127 (9th Cir. 2000) (en banc) ("[S]ection 1915(e) not only permits, but requires a
 19 district court to dismiss an in forma pauperis complaint that fails to state a claim.").

20 "[W]hen determining whether a complaint states a claim, a court must accept as true all
 21 allegations of material fact and must construe those facts in the light most favorable to the
 22 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
 23 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) "parallels the language of Federal Rule of
 24 Civil Procedure 12(b)(6)."'). However, while liberal construction is "particularly important in
 25 civil rights cases," *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992), the Court may not
 26 "supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents*
 27 *of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). The district court should grant
 28 leave to amend, however, unless it determines that "the pleading could not possibly be cured by

1 the allegation of other facts" and if it appears "at all possible that the plaintiff can correct the
 2 defect." *Lopez*, 203 F.3d at 1130-31.

3 Here, the Court finds that Plaintiff's Complaint survives the sua sponte screening required
 4 by 28 U.S.C. § 1915(e)(2), and that Plaintiff is therefore automatically entitled to U.S. Marshal
 5 service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) ("The officers of
 6 the court shall issue and serve all process, and perform all duties in [IFP] cases."); FED.R.CIV.P.
 7 4(c)(2) (providing that "service be effected by a United States marshal, deputy United States
 8 marshal, or other officer specially appointed by the court ... when the plaintiff is authorized to
 9 proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915."). However, Plaintiff is cautioned that
 10 "the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any
 11 subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*,
 12 481 F.Supp.2d 1115, 1119 (S.D. Cal. 2007).

13 **III. Conclusion and Order**

14 Good cause appearing, **IT IS HEREBY ORDERED** that:

15 1. Plaintiff's Motion to Proceed IFP per 28 U.S.C. § 1915(a) [Doc. No. 2] is
 16 **GRANTED**.

17 **IT IS FURTHER ORDERED** that:

18 2. The Clerk shall issue the summons, provide Plaintiff with a certified copy of both
 19 this Order and his Complaint, and forward them to Plaintiff along with a blank U.S. Marshal
 20 Form 285 for each Defendant named in his Complaint. Plaintiff shall complete the Form 285s
 21 and forward them to the United States Marshal. The U.S. Marshal shall then serve a copy of the
 22 Complaint and summons upon Defendants as directed by Plaintiff on each U.S. Marshal Form
 23 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);
 24 FED.R.CIV.P. 4(c)(2).

25 3. Plaintiff shall serve upon Defendants or, if appearance has been entered by
 26 counsel, upon Defendants' counsel, a copy of every further pleading or other document
 27 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
 28 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy

1 of any document was served on Defendants, or counsel for Defendants, and the date of service.

2 Any paper received by the Court which has not been filed with the Clerk or which fails
3 to include a Certificate of Service will be disregarded.

4 **IT IS SO ORDERED.**

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6 DATED: June 19, 2007

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8 Hon. Barry Ted Moskowitz
9 United States District Judge

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